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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 341

WALTER LEE HALL,

Petitioner,

vs.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA ET AL.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia at Richmond and/or To the Circuit Court of the City of Richmond

O. DAVID ZIMRING,
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INDEX

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions Presented	2
Statutes and Constitutional Provisions Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	12
Appendix A—Judgment of the Supreme Court of Appeals of Virginia	13
Appendix B—Judgment of the Circuit Court of the City of Richmond	14
Appendix C—Chapter 696, Acts of Assembly of Virginia, 1952	16

CITATIONS

Cases:

Alfred v. Essen, 91 Cal. 466	11
Amalgamated Association, etc. v. Wisconsin Employment Relations Board, 340 U. S. 383	7, 8
American Federation of Labor v. Bain, 31 Ore. 87	8
American Federation of Labor v. Swing, 312 U. S. 321	8
Ancient Egyptian Arabic Order v. Michaux et al, 279 U. S. 737	9
Campbell v. Sherman, 35 Wisc. 103	11

Page

Chesapeake and Ohio R.R. Co. v. Mihas, 280 U. S. 102 7

Coal and Coke Ry. Co. v. Conley et al, 67 W. Va. 129 10-11

Davis v. Wechsler, 263 U. S. 22..... 10

Enterprise Irrigation District v. Farmers Mut. Canal Co., 243 U. S. 157..... 10

Ex Parte Young, 209 U. S. 123..... 11

Florida State Hosp., etc. v. Durham Iron Co., 194 Ga. 350 11

Garner v. Teamsters Union, 346 U. S. 485..... 8

Hineen v. Wells, 144 Mass. 479..... 11

Lawrence v. State Tax Commission, 286 U. S. 276 10

Loesch v. Koehler, 144 Ind. 278..... 11

Love et al v. Griffith et al, 266 U. S. 32..... 10

Osborn v. Bank of United States, 9 Wheat. 738.. 11

Poindexter v. Greenhow, 114 U. S. 270..... 11

Saratoga, etc., Corp. v. Pratt, 227 N. Y. 429..... 11

Sayers v. Bullar, 180 Va. 222..... 11

Thornhill v. Alabama, 310 U. S. 88..... 8

Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552..... 8

Statutes and Constitutional Provisions:

Chapter 696, Acts of Assembly of Virginia, 1952 (Code of Virginia, Title 56, Chapter 17, Sections 56-509 to 56-527)..... 2, 3

Code of Virginia, 1950, secs. 40-75 to 40-95..... 8-9

Labor Management Relations Act, 1947 (29 U.S.C. 141, et seq)..... 3

29 U.S.C. 151..... 3

Page

29 U.S.C. 157 3

29 U.S.C. 163 3

Laws of Missouri, 1947, Vol. I, p. 359 9

Constitution of the United States:

Article I, Sec. 8 3

Article VI 3

Fourteenth Amendment 4

28 United States Code 1257(3) 2

Miscellaneous:

49 American Jurisprudence 311 10

81 Corpus Juris Secundum 1316-1318 10

43 American Law Reports 408-409 10

IN THE

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WALTER LEE HALL,

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vs.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA; H. LESTER HOOKER, CHAIRMAN, AND W. MARSHALL KING AND RALPH T. CATTERALL, MEMBERS, STATE CORPORATION COMMISSION, WILLIAM C. SEIBERT, CHARLES H. RYBURN, JR., AND T. H. FLETCHER, JR.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia at Richmond and/or To the Circuit Court of the City of Richmond

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Petitioner, Walter Lee Hall, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above-entitled case on June 16, 1954, and/or the judgment of the Circuit Court of the City of Richmond, entered on October 7, 1953.

Opinions Below

The final order and judgment of the Supreme Court of Appeals of Virginia sought to be reviewed in this petition is unreported. It is printed in Appendix A hereto, *infra,* p. 13. That order affirms a judgment of the Circuit Court of the City of Richmond issued on October 7, 1953. The latter judgment is likewise unreported and is printed in Appendix B, hereto, *infra,* p. 14.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on June 16, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since the validity of a state statute on the ground of its being repugnant to the Constitution and a law of the United States is drawn in question.

Questions Presented

In this case the Supreme Court of Appeals of Virginia affirmed as "plainly right" a judgment of the Circuit Court of the City of Richmond, holding that a suit by petitioner against certain state officials to recover damages resulting from the enforcement of a state statute, which statute the petitioner claimed was repugnant to the Constitution and laws of the United States, is a suit against the state and cannot be maintained without the state's consent. The questions presented are:

1. Whether this non-federal ground of decision is tenable and adequate to justify the judgment and prevent a review by this Court of the federal question properly asserted in the court below.
2. If the first question is answered in the negative, whether the statute in question—Chapter 696 of the Acts of Assembly of Virginia, 1952,—conflicts with the laws of the United States and is repugnant to the Constitution of the United States.

Statutes and Constitutional Provisions Involved

The state law, the validity of which is at issue in this petition is Chapter 696, Acts of Assembly of Virginia, 1952, (Code of Virginia, Title 56, ch. 17, Sec. 56-509 to 56-527). The full text of this statute is set forth in Appendix C, hereto, *infra,* pp. 16-23.

The Labor-Management Relations Act, 1947, 29 U.S.C. §141 *et seq.,* provides, insofar as is directly pertinent to this appeal:

> §151.—"It is declared to be the policy of the United States to eliminate the causes of certain substantial interruptions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."
>
> §157.—"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."
>
> §163.—"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The pertinent portions of the Constitution of the United States involved in this petition are:

> *Article I, Sec. 8:* "The Congress shall have Power to regulate commerce . . . among the several States. . . ."
>
> *Article VI:* ". . . this Constitution and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . ."

Article XIV, of the Amendments: "... nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Statement

Petitioner is an employee of Washington, Virginia and Maryland Coach Co., Inc. (hereinafter referred to as the "Company"), an interstate motor bus carrier, subject to the jurisdiction of the National Labor Relations Board. On December 10, 1952, petitioner, together with the other employees of the Company, engaged in a work stoppage in support of their demands for modifications in the labor agreement between the Company and the duly authorized collective bargaining representative of the Company's employees—Division 1079, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL (hereinafter referred to as the "Union"). On December 11, 1952, respondent John S. Battle, then Governor of the State of Virginia, acting through his duly designated agents and subagents (the other respondents herein), and in accordance with the powers conferred upon him by Chapter 696, Acts of Assembly of Virginia, 1952, seized and thereafter operated the plants and equipment of the Company until February 9, 1953.

On January 12, 1953, the Company and the Union entered into an agreement providing for a settlement of the labor dispute. In accordance therewith, all employees were to return to work in order of seniority, beginning on January 19, 1953.

Petitioner had refused to accept employment with the State in its operation of the utility during the time that the labor dispute between the Company and the Union remained unsettled, although, in accordance with §6 of the aforementioned seizure statute, such refusal did not affect his status as an employee of the Company. The labor dispute having been settled, and his seniority entitling him to employment on January 19, 1953, in accordance with the aforementioned

agreement between the Company and the Union, petitioner reported for work on that day. However, on that day, because of certain administrative difficulties in returning the operation of the utility to the Company, the seizure and control of the utility by the respondents had not yet been lifted (as noted above it was not lifted until February 9, 1953). Although the Company was willing for petitioner to return to work, and his job was available, respondents refused to permit petitioner to work on January 19, 1953, and petitioner was denied employment until the seizure was lifted on February 9, 1953. But for the fact that the respondents were in control of the utility under the provisions of Chapter 696, Acts of Assembly of Virginia, 1952, petitioner would have been employed on January 19, 1953.

On February 6, 1953, petitioner[1] filed suit against the respondents in the Circuit Court of the City of Richmond seeking damages for the injury incurred by the refusal of the respondents to permit petitioner to return to work on January 19, 1953. The federal question herein sought to be reviewed was specifically raised in the original pleading (the Motion for Judgment) filed by petitioner in this case. Paragraph 8 of that pleading alleged:

> "8. Defendants' possession and control of the operations of the Company on, before, and subsequent to January 19, 1953, and their action in denying employment to the plaintiff(s) on January 19, 1953, were each wrongful and unlawful in that Chapter 696, Acts of Assembly, 1952, pursuant to which said possession, control, and actions were taken, is invalid and unconstitutional in that it is repugnant to and in conflict with the provisions of the Labor-Management Relations Act, 1947, as amended, and contrary to the provisions of Article I, Section 8, Article VI, and the Fourteenth Amendment of the Constitution of the United States. . . ."

[1] The suit was originally filed on behalf of the petitioner and a number of other similarly situated employees of the Company. Subsequently, however, the Court granted motions to sever each of the cases from those of the other complainants.

Thereafter, respondents filed a demurrer to this suit on the ground that the suit "is in effect against the State, and the State cannot be sued except by its permission, and the State has not given its permission to the plaintiffs to be sued in this case." On October 7, 1953, the Circuit Court of the City of Richmond sustained the demurrer and dismissed petitioner's suit.[2]

Petitioner filed a timely petition for Writ of Error in the Supreme Court of Appeals of Virginia. In that petition, petitioner continued to press the same federal question raised in the lower court, i.e., petitioner continued to argue throughout its petition that the seizure law is unconstitutional, and that a suit, such as this, directed against state officials acting under the authority of a statute claimed to be repugnant to the Constitution and laws of the United

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[2] The main ground on which, from the outset, petitioner based his suit was the contention that the state seizure statute under the authority of which the respondents were acting when they denied him employment was invalid as repugnant to the Constitution and laws of the United States. As an alternative, petitioner also asserted, however, that even if that statute is valid, the conduct of the respondents in refusing him employment was in violation of the seizure law. Directed against this *alternative* theory respondents also demurred on the separate ground that the statute was fully complied with. The Circuit Court of the City of Richmond noted in its order that this ground for the demurrer, as well as the one discussed above, were each deemed to be separately sufficient to sustain the demurrer. In affirming the judgment of the Circuit Court, the Supreme Court of Appeals made no distinction between the two grounds of the demurrer.

It is plain, however, that this circumstance in no way affects the propriety of the petition for certiorari. The issue of whether the terms of the state statute in question were violated by the respondents raises no federal question and is not presented as an issue in this petition. The Circuit Court of the City of Richmond made it plain that its judgment was based separately and independently on the ground of the demurrer which was directed against that phase of petitioner's suit that *did* raise the federal question, and even if the Courts below were correct in their conclusion that the state statute was not violated this is wholly irrelevant to petitioner's principal claim that, in any event, that statute is unconstitutional.

States was not—as the lower court had found in sustaining the demurrer—a suit against the state.

On June 16, 1953, the Supreme Court of Appeals of Virginia refused petitioner's Writ of Error in an order which stated that the Court was of the opinion that the judgment of the lower court was "plainly right," and that the effect of its refusal to grant the Writ "is to affirm the judgment of the said Circuit Court."[3]

Reasons for Granting the Writ

1. The circumstances and considerations which underlie petitioner's contention that the Virginia public utilities seizure law is repugnant to the Constitution and laws of the United States may be briefly summarized as follows:

a. The Virginia statute has as its purpose, and certainly as its practical effect, the regulation of peaceful strikes in the industries covered by it. Once the state has seized the Company's operations the statute prohibits each and every one of the activities (including picketing) which are the normal concomitants of that concerted withholding of services which is known as a strike. As such, this statute, as a device for the regulation of strikes and collective bargaining in public utilities, stands on precisely the same footing as the Wisconsin statute which this Court held to be unconstitutional in *Amalgamated Association, etc. v. Wisconsin Employment Relations Board,* 340 U. S. 383. Like the Wisconsin statute, the Virginia statute is an intrusion into a field fully occupied by Congress in the Labor-Management Relations Act, 1947. And just as the device employed for regulating labor disputes in the

[3] In these circumstances it would appear that the writ of certiorari may properly be directed to the Supreme Court of Appeals of Virginia. However, it appears that subsequent to the refusal by that Court of petitioner's writ of error that court remitted a part —though not all—of the record in this case to the Circuit Court of the City of Richmond. Petitioner is therefore uncertain as to which Court the writ of certiorari should be directed, and has therefore requested that the writ issue to both courts, jointly or in the alternative. *Chesapeake and Ohio R.R. Co. v. Mihas,* 280 U. S. 102.

Wisconsin statute (i.e., compulsory arbitration) is a device that the Congress has specifically rejected, so also is the Virginia technique (i.e., seizure) one that the Congress has specifically considered and specifically rejected. Under the Commerce and the Supremacy clauses of the federal Constitution the Virginia seizure statute must fall.

b. The Virginia statute, moreover, is in direct conflict with the Labor-Management Relations Act, 1947. It directly interferes with the right to strike and the right to picket both of which are specifically protected by the federal law. *Garner v. Teamsters Union,* 346 U. S. 485. And to the very great extent that it interferes with, disrupts, and makes a mockery of collective bargaining it is repugnant to the basic purpose and policy of the federal law to promote and encourage collective bargaining. *Amalgamated Association, etc. v. Wisconsin Employment Relations Board, supra.*

c. By interfering with the right to strike and to picket the Virginia seizure law also deprives the employees involved of liberty and property without due process of law, *Wolf Packing Company v. Court of Industrial Relations,* 267 U. S. 552; *American Federation of Labor v. Bain,* 31 Oreg. 87; and interferes with freedom of speech and assemblage in contravention of the 14th Amendment of the Constitution of the United States. *American Federation of Labor v. Swing,* 312 U. S. 321; *Thornhill v. Alabama,* 310 U. S. 88.

2. This federal question, properly raised by petitioner in the courts below, is of great importance not only to the petitioner and his several hundred fellow employees of the particular public utility in which he is employed, but also to all of the thousands of other public utility employees in Virginia whose right to bargain collectively and to engage in peaceful economic action for their mutual aid and protection is similarly circumscribed by the statute in question here. The present law was enacted in 1952, shortly after the decision of this Court in *Amalgamated Association, etc. v. Wisconsin Employment Relations Board, supra,* to revise and replace an earlier 1947 statute (*Code of Virginia, 1950,*

Secs. 40-75 to 40-95) in a deliberate effort to avoid the impact upon the 1947 statute of the *Amalgamated Association* decision. There has never been a determination by any court as to whether the current statute succeeded in that purpose or whether—as petitioner believes—the current statute, no less than its 1947 predecessor, conflicts with the laws and Constitution of the United States.

Nor is the significance of the federal question raised by petitioner in this suit confined to the public utility employees of the State of Virginia. Several other states have enacted legislation which similarly attempts to regulate strikes and picketing in public utilities, through compulsory arbitration or seizure and, in some instances at least, doubts as to the validity of these statutes have never been put to rest by definitive decisions.[4] By granting the instant petition for certiorari this court may well resolve these uncertainties which have a disturbing and unsettling effect upon the collective bargaining relationships of the very many public utility employees and companies involved.

3. As already noted, the courts below refused to consider the important federal question raised by the petitioner, disposing of the suit on the ground that it was, in effect, a suit against the State prosecuted without the State's consent. This Court has made it clear that it will inquire "not only whether (a federal right) was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support." *Ancient Egyptian Arabic Order v. Michaux et al*, 279 U. S. 737. This Court has said that Supreme Court review of a federal question properly raised cannot be

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[4] For example, the Missouri "King-Thompson Act" (*Laws of Missouri, 1947*, Vol. I, p. 359) provides, inter alia, for seizure in the case of public utility strikes. No court has ruled upon the validity of these provisions, although the Attorney General of Missouri has issued an advisory opinion that they are invalid.

avoided by a non-federal ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Farmers' Mut. Canal Co.*, 243 U. S. 157, 164; and see *Love et al v. Griffith et al*, 266 U. S. 32; *Davis v. Wechsler*, 263 U. S. 22; *Lawrence v. State Tax Commission*, 286 U. S. 276.

Petitioner respectfully submits that by demurring to petitioner's suit on the ground that it constituted a suit against the state, respondents interposed a non-federal ground so patently untenable that it can only be viewed as a device to prevent consideration of petitioner's claim that the Virginia statute which caused his loss of income is unconstitutional.

It is now a firmly established principle, accepted by the highest courts of all states that have passed upon the issue, that a suit for damages against defendants who act as officers of a state under color of an unconstitutional statute is not an action against the state, and is not barred by the usual limitations on suits against a sovereign.[5] One of the most lucid expressions of this principle appears in a decision by the Supreme Court of West Virginia whose decisional policy, it may be noted, has always closely paralleled that of Virginia:

> "The government of a state is its (the state's) mere agent, and all of its officers act in a representative capacity, binding the state by their acts only in those instances in which they have authority to act for her. The law under which they act constitutes their power of attorney or warrant of authority, *and when, for any reason, that law is void, the act, done under it, is likewise void and amounts to a wrong and a trespass. As, in such case, a State cannot be deemed to have authorized the wrongful act, the person who did it, although an officer in name, is deemed to have acted in his individual*

[5] The cases are collected in 49 Am. Jur. 311; 81 C.J.S. 1316-1318; and 43 A.L.R. 408-409.

capacity." (Emphasis added) Coal and Coke Ry. Co. v. Conley et al, 67 W. Va. 129.[6]

The Eleventh Amendment to the Constitution of the United States places a limitation on the judicial power of the United States so as, in certain circumstances, to prohibit suits against States, and it is in the interpretation of this amendment that the greatest body of law has been developed on the issue now under discussion. In an unbroken line of some fifty decisions—beginning with *Osborn v. Bank of United States,* 9 Wheat 738, in 1824—this Court has consistently adhered to the principle that a suit against a state officer acting under the color of an unconstitutional statute is not a suit against the state. The language of this Court in *Ex Parte Young,* 209 U. S. 123, summarizes the principle:

> "The attempt of a State officer to enforce an unconstitutional law is a proceeding without authority of, and does not affect the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. *The State has no power to impart to its officers immunity from responsibility to the supreme authority of the United States."* (Emphasis added.)[7]

Despite the single consistent line of authority to the contrary, and despite the fact that respondents were not able to cite one case in Virginia[8] or elsewhere to support their

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[6] To the same effect, see, for example: *Campbell v. Sherman,* 35 Wis. 103; *Alfred v. Essen,* 91 Cal. 466; *Florida State Hosp. etc. v. Durham Iron Co.,* 194 Ga. 350; *Saratoga etc. Corp. v. Pratt,* 227 N. Y. 429; *Loesch v. Koehler,* 144 Ind. 278; *Hineen v. Wells,* 144 Mass. 479.

[7] A thorough analysis of this problem appears in the early leading case *Poindexter v. Greenhow,* 114 U. S. 270.

[8] Indeed in *Sayers v. Bullar,* 180 Va. 222, the Supreme Court of Appeals of Virginia had noted that "if [agents of the state] act wrongfully their conduct is chargeable to them alone," citing, with approval, the aforementioned decision of this Court in the *Poindexter* case, *supra,* fn. 7.

assertion that a suit such as this (based upon the claim that the statute involved is invalid) is a suit against the state, the Circuit Court of the City of Richmond sustained respondents' demurrer, and the Supreme Court of Appeals of Virginia concluded that that judgment "is plainly right."

Petitioner respectfully submits that in such circumstances the non-federal ground relied upon by the courts below in avoiding consideration of the important federal question raised by the petitioner must be viewed as untenable and without fair support. It cannot be allowed to bar this Court from consideration of that question.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

O. David Zimring,
I. J. Gromfine,
Justus R. Moll,
Seymour J. Spelman,
Of Counsel.

Bernard Cushman,
Counsel for Petitioner.

APPENDIX A

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of June, 1954.

The petition of Walter Lee Hall for a writ of error to a judgment rendered by the Circuit Court of the City of Richmond on the 7th day of October, 1953, in a certain notice of motion for judgment then therein depending, wherein the said petitioner and others were plaintiffs and John S. Battle, Governor of the Commonwealth of Virginia, et al, were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said Circuit Court.

A copy, Teste:

(S.)

Clerk.

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

WALTER LEE HALL, et al

v.

JOHN S. BATTLE, etc., et al

ORDER

On the 12th day of May, 1953, this case came on to be heard upon the defendants' Demurrer and Amended Demurrer to the plaintiffs' Motion for Judgment, and on June 17, 1953, the plaintiffs filed a motion which prayed for the severance of the action of plaintiff Walter Lee Hall from the actions of the other plaintiffs herein; and requesting the Court to rule upon paragraphs Nos. 2 and 3 of the defendants' Demurrer in so far as they apply to the separate action of plaintiff Hall, and the Court, upon consideration whereof, being of the opinion that said motion should be granted, doth grant the same, and the Court being of the further opinion that the Motion for Judgment is not sufficient in law and that the defendants' Demurrer, as it applies to the separate action of plaintiff Hall, should be sustained on grounds set forth in paragraphs Nos. 2 and 3 thereof, each of which grounds is deemed to be separately sufficient;

IT IS, THEREFORE, ADJUDGED, ORDERED AND DECREED that the plaintiffs' Motion for Judgment be, and the same is, hereby dismissed, to all of which the plaintiffs, by counsel, object and pray that their exceptions be noted of record, which is accordingly done.

IT IS FURTHER ORDERED that the defendants recover their cost in this behalf expended.

I ask for this:

_____

Counsel for Defendants.

Seen:

_____

Counsel for Plaintiffs.

APPENDIX C

CHAPTER 696

An Act to prevent interruption or suspensions in the operation of certain public utilities, and to that end to declare it to be the public policy of the State that the functioning and operation of such utilities are clothed with a public interest and are essential to the health, safety and welfare of the citizens of Virginia; to authorize the Governor to take possession of and operate on behalf of the State, public utilities and to prescribe the terms and conditions of such taking possession of and operation, and the power, authority and duty of the Governor with respect thereto; to provide how any such utility may be returned to private management and control; to declare certain acts unlawful; and to impose penalties. (H 704)

Approved April 7, 1952

Be it enacted by the General Assembly of Virginia:

1. § 1. The continuous, uninterrupted and proper functioning and operation of public utilities engaged in the business of furnishing water, light, heat, gas, electric power, transportation or communication, or any one or more of them, to the people of Virginia are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the State to permit any substantial impairment or suspension of the operation of any such utility and it is the duty of the Government of the State to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities or catastrophes which would result therefrom. It is therefore further declared that such utilities are clothed with a vital public interest and to protect the same it is necessary that impairment or suspension of the operation of any such utility for any reason be prevented to the extent and by the means hereinafter provided.

§ 2. Whenever in the judgment of the Governor there is an imminent threat of substantial curtailment, interruption or suspension in the operation of any public utility hereinabove mentioned he shall promptly make an investigation to determine whether, in his opinion, an actual curtailment, interruption or suspension of operation will constitute a serious menace or threat to the public health, safety or welfare, and if he concludes that it will, he shall forthwith issue an executive proclamation so declaring and stating that at the time of such curtailment, interruption or suspension of operation he will take immediate possession of the utility, its plant and equipment, or so much thereof as may be necessary, for the use of and operation by the Commonwealth. Where the Governor finds it advisable for effectuation of the purposes hereof he may by proclamation advance or defer such taking of possession.

§ 3. The Governor may possess and operate such properties in the manner hereinafter provided and through such department or agency of the State as he may designate.

§ 4. If the Governor shall issue a proclamation of intention to take possession of and operate any such utility as provided herein, he shall immediately ascertain what positions of employment are necessary to be filled in order to operate the same to such extent as may be required to protect the public safety and welfare, and the duties incident to each such position, and shall ascertain from those persons then employed in such positions whether they will accept employment by the State to perform like duties for the State. Any such person who will accept employment by the State shall be entitled to be employed and to continue in such employment for such time as the Governor may determine. It shall be the duty of the management of any such utility to provide promptly and furnish to the Governor, upon his request, detailed information with respect to the positions necessary to be filled and the duties incident to or pertaining to each such position, and the name of the person presently holding same.

§ 5. In the event that any person or persons then employed by the utility in any such necessary positions shall fail to indicate an intention to work for the State in operating the utility, when inquiry is made of such person by the Governor or his agent, the Governor shall immediately institute measures to employ another person or other persons to perform the required duties of any one not indicating such intention. No person who upon such inquiry fails to indicate intention to work for the State may thereafter claim the right to employment by the State provided in § 4 of this act.

§ 6. The status of no person as an employee of the utility shall be affected by either his acceptance of employment by the State or by his refusal of such employment.

§ 7. After any proclamation of intention to take possession, the Governor may, by and through agents designated by him, enter upon the property of the utility with prospective employees and familiarize them with the nature of the work incident to the positions in which it is contemplated they will be employed and train them to discharge the duties thereof. The management of the utility and all State departments, institutions and agencies shall cooperate with the Governor in the operation of the utility and in the securing and training of persons for employment in such operation.

§ 8. Unless the management of the utility believes that the Governor is mistaken in his conclusion as to the curtailment, interruption or suspension of operation, actual possession of the utility, its properties and facilities, shall be delivered at the time stated in the executive proclamation. In the event of refusal of possession, upon application of the Governor any court of record of any county or city in which the utility's main executive offices in this State are located, or the judge thereof in vacation, shall issue a rule requiring the authorized representatives of such utility to show cause why possession should not be delivered at the time stated in the executive proclamation. The rule shall

be given preference over all other matters pending before such court. After reasonable notice, the court or judge shall hear the parties and determine as promptly as possible the question of fact relating to the curtailment, interruption or suspension of the operation of the utility and whether the facts require the delivery of possession and render judgment requiring or denying delivery of possession as the case may be.

§ 9. No person, organization or association or any bargaining representative of the employees or any representative or agent of the management of the utility shall interfere with or obstruct the Governor, or any State representative or agent designated by him, in his efforts to secure or contract for the services of the officers and employees of the utility or of any person to engage in or continue the operation of the utility, or shall encourage or solicit any such persons not to render such services or shall interfere in or obstruct the training of prospective employees in the operation of the utility by the Governor or by the designated State representatives. Upon seizure of any utility as provided herein the establishment or conduct of a picket line near or adjacent to any work engaged in or proposed to be engaged in by any such persons employed or sought to be employed by the State in its operation of such utility shall be deemed an unlawful obstruction of the exercise of an essential function of the State Government and a violation of this section; and all persons ordering, directing, encouraging or participating in any such picketing shall be guilty of violating this section.

§ 10. The expense of operating any utility pursuant to the provisions of this act, and of training prospective employees or otherwise preparing to operate the same shall be paid out of the appropriation for criminal charges upon such authorizations as the Governor may prescribe, and all funds, revenues or reimbursements derived from or received as a result of such operations shall be paid into the State treasury and credited to such appropriation, or, after full

reimbursement of such appropriation for expenditures therefrom, additional funds may be credited to such other appropriations as the Governor may direct, and subsequent disbursements in carrying out the purposes of this act may be made therefrom.

§ 11. During the period of the State's operation of any utility, pursuant to the provisions of this act, the Governor shall observe the utility's previously established salaries, wages, conditions of employment, practices as to merit or length of service increases and as to promotions; it being the intent of this act that any disputes as to such matters shall be settled by collective bargaining between the parties to such disputes.

§ 12. The Governor may provide in such manner as he deems appropriate for the collection of the gross revenues accruing from the utility during the time of its operation by the State. After payment of proper operating expenses and reimbursement of the State for all expenses incurred in preparing to operate same and making allowances of the additional items as provided in § 15 of this act in defining net income, eighty-five per centum of the net income shall be paid to the utility as compensation for the temporary use of its business, facilities and properties. The amount of money so paid shall in no wise control the amount of just compensation to be allowed the utility. In the event of disagreement as to the amount of payments under this section, either party may, by appropriate petition, submit the matter to the State Corporation Commission with the right of appeal from its decision to the Supreme Court of Appeals.

§ 13. Whenever the authorized representatives of any such utility shall notify the Governor, in writing, stating that the utility is in position to and can and will resume operations and render normal public service and shall satisfy the Governor, or his designated agent, of the correctness of such statement, the Governor, or such agent, upon the request of the utility management, shall restore to the possession of the utility its properties and facilities. In

the event that the Governor or such agent for any reason refuses such restoration of possession, the utility shall have the right to have a rule issued by any court of general chancery jurisdiction in the city of Richmond, or the judge thereof in vacation, to show cause why such possession should not be restored. The rule shall provide for ten days' notice to the Governor or such agent before cause is required to be shown. The decision of such court, or the judge thereof in vacation, on such question shall be final as to conditions then existing, but shall not be a bar to subsequent requests by the utility for restoration of possession. Nothing in this section shall be construed as denying to the Governor the right to restore possession at any time when, in his judgment, the public interest so requires.

§ 14. The utility shall be entitled to receive reasonable, proper and lawful compensation for the use of its business, facilities and properties by the State. In the event the parties in interest are unable to agree upon the amount of such compensation either party may file a petition in the court rendering judgment requiring delivery of possession of the utility, or in the event no such judgment was rendered, in any court mentioned in § 8 of this act, for the purpose of having the same judicially determined. The court shall, without a jury, hear such evidence and argument of counsel as may be deemed appropriate and render judgment thereon or may refer to a commissioner such questions as are considered proper and act upon the commissioner's report as in ordinary chancery proceedings. An appeal shall be to the Supreme Court of Appeals from any final judgment of the court rendered under this section. If the amount of compensation so determined shall be less than the sum paid to the utility under the provisions of § 12 of this act the utility shall return the excess by paying the same to the State Treasurer to be credited as the Governor may direct in accordance with the provisions of § 10 of this act.

§ 15. The words "utilities" or "public utilities" when used in this act shall be construed to mean any person, part-

nership, association or corporation engaged in the business of furnishing electric power, water, light, heat, gas, transportation or communication, or any one or more of them to the people of Virginia.

"Net income" with respect to operation of a utility by the State shall be construed to mean the gross revenues derived from such operation after deducting therefrom:

(1) The costs of operation and maintenance of the utility,

(2) The amount of depreciation during the time of such operation based on the amount allowed in the utility's federal income tax return,

(3) Federal, State, and local taxes which would be payable by the utility, if the properties were operated by it,

(4) Interest on the indebtedness of the utility, and

(5) Payments for the cost of insurance.

All of such items shall be prorated on an annual basis in proportion to the time the plant is operated by the State.

§ 16. Any person violating any of the provisions of §§ 4, 7 or 9 of this act shall be guilty of a misdemeanor and upon conviction of same shall be fined not less than ten nor more than one thousand dollars, and may be imprisoned in jail for not more than twelve months.

§ 17. In addition to the remedies herein provided, the Governor is hereby authorized to apply to the Circuit Court of the City of Richmond or to any court mentioned in § 8 of this act for, and such court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction restraining any person, organization, association or corporation from violating any provision of this act irrespective of whether or not there exists an adequate remedy at law.

§ 18. It shall be the duty of every attorney for the Commonwealth to whom the Governor shall report any violation of §§ 4, 7 or 9 of this act to cause proceedings to be prosecuted without delay for the fines and penalties in such cases. The Attorney General shall be charged with the duty of enforcing all other provisions of this act and shall rep-

resent the Governor in all matters arising thereunder. Whenever he shall deem it in the best interest of the State the Attorney General may employ special counsel to assist him in carrying out the duties imposed by this section and the expense so incurred shall be considered as an expense of operation of the utility and paid in accordance with the provisions of § 10 of this act.

§ 19. Nothing in this act shall apply to any express company, sleeping car company, common carrier engaged in interstate commerce by railroad or by air or to any company which is directly or indirectly owned or controlled by any carrier by railroad.

§ 20. Nothing in this act shall be considered or construed as in any way questioning or impairing the constitutional or statutory powers of the Governor as commander in chief of the land and naval forces of the State.

2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared to be severable.

3. An emergency exists and this act is in force from its passage.

TABLE OF CONTENTS

Page

I. Statement of the Case and the Proceedings Below 2

B. The Question Presented 4

II. Argument 5

The Decision of the Circuit Court of the City of Richmond Rested on a Non-Federal Ground. Therefore, This Honorable Court Does Not Have Jurisdiction to Hear This Case 5

III. Conclusion 10

TABLE OF CITATIONS

Cases

Allen Engineering Co. v. Kays, 106 Ark. 174, 152 S. W. 992 7

Board of Public Works v. Gannt, 76 Va. 455 6

Broad R. P. Co. v. South Carolina, 281 U. S. 537 6

Cannon v. Montgomery, 184 Ga. 588, 192 S. E. 206 7

Commonwealth v. Chilton Malting Company, 154 Va. 28, 152 S. E. 373 6

Copperweld Steel Co. v. Industrial Commission, 324 U. S. 780 5

Drucker v. Salomon, 21 Wis. 628, 94 A. M. Dec. 571 8

Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157 6

Ford Motor Co. v. Department of Treasury, 323 U. S. 459 7

Fox River Paper Co. v. Railroad Commission, 274 U. S. 651 6

Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323 7

Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533 8

Hedgebeth v. North Carolina, 334 U. S. 806 5

Heiser v. Severy, 117 Mont. 105, 158 P. 501 7

Howat v. Kansas, 258 U. S. 181 5

Page

In Re Ayers, 123 U. S. 443 7
Looney v. Stryker, 31 N. M. 557, 249 P. 112 7
Lowenstein v. Evans, 69 Fed. 908 (C. C. 1895) 7
McCoy v. Shaw, 277 U. S. 302 5
Moyer v. Peabody, 212 U. S. 78 8-9
Parsons v. Slaughter, 63 Fed. 876 (C. C. 1894) 7
Sayers v. Bullar, 180 Va. 222, 22 S. E. 2d 9 6
Sperry-Hutchinson Co. v. Kuhn, 212 Fed. 555 (D. C. 1912) 7
Stembridge v. Georgia, 343 U. S. 541 5
Tyler v. Dane County, 289 Fed. 843 (D. C. 1923) 7
Union Trust Co. v. Stearns, 119 Fed. 790 (C. C. 1903) 7
Wilson v. State Highway Commissioner, 174 Va. 82, 4 S. E. 2d 746 6

Statutes

Code of Virginia, Chapter 17, Title 56 2
Code of Virginia, Section 56-509 7
Code of Virginia, Section 56-527 7

IN THE

Supreme Court of the United States

October Term, 1954

No. 341

WALTER LEE HALL,

Petitioner

v.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA; H. LESTER HOOKER, CHAIRMAN, AND W. MARSHALL KING AND RALPH T. CATTERALL, MEMBERS, STATE CORPORATION COMMISSION; WILLIAM C. SEIBERT, CHARLES H. RYBURN, JR., AND T. H. FLETCHER, JR.,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia at Richmond and/or to the Circuit Court of the City of Richmond

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this Court and, further, the lack of substance in the questions present by this petition, file this brief in opposition to the petitioner's petition for writ of certiorari. The respondents include herein their opposition to the petition on writ of certiorari on the ground that the decision below was not rested on a

federal question. The matters here relied upon are more particularly stated below.

I.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

On February 7, 1953, petitioner filed his notice of motion for judgment in the instant case in the Clerk's Office of the Circuit Court of the City of Richmond. This notice of motion for judgment alleged that the petitioner had suffered damages in the amount of Fifteen Hundred Dollars ($1,500) because of loss of earnings, inconvenience, hardship and anxiety resulting from the respondents' actions in refusing to allow him to return to work for the Washington, Virginia and Maryland Coach Company, Incorporated, on January 19, 1953.

This action was instituted in the Circuit Court of the City of Richmond as a direct result of the respondents' seizing the Washington, Virginia and Maryland Coach Company, Incorporated, on December 11, 1952, under the authority of the Public Utilities Act, Chapter 696, Acts of Assembly 1952 (Chapter 17, Title 56, Code of Virginia). This suit against the respondents for pecuniary damages was instituted after the Circuit Court of the City of Richmond denied the petitioner's and others' bill for a temporary injunction in the case styled H. J. Harris, et als v. John S. Battle, Governor of the Commonwealth of Virginia, et al, Case No. 111, October Term 1954, Supreme Court of the United States. In the companion case of Harris v. Battle a temporary and later permanent injunction was sought against the respondents to enjoin them from enforcing Chapter 696 of the Acts of Assembly 1952 on the grounds that that Act conflicted with the Labor Management Relations Act of 1947 and that it was repugnant to the Consti-

tution of the United States. In the instant case of Hall v. Battle the respondents filed a demurrer in the Circuit Court of the City of Richmond. On May 12, 1953, the Circuit Court heard argument on respondents' demurrer in the instant case and on May 13, 1953, that Court sustained the respondents' demurrer on grounds (1) that there was a misjoinder of causes of actions and (2) that in effect the suit was against the State. The Court declined to rule on the sufficiency of ground (3) that admitting the petitioner's allegations the respondents had not acted outside the scope of their authority. On October 7, 1953, the Court granted a motion of the petitioner to sever his cause from that of the other eight plaintiffs and to have the Court rule upon the individual sufficiency on grounds 2 and 3 of the demurrer. That same day the Circuit Court of the City of Richmond entered an order sustaining the demurrer on grounds (2), while this suit is in form against the officers and agents of the State, it is in effect against the State, and the State cannot be sued except by its permission, and the State has not given its permission to the plaintiffs to be sued in this case, and (3), the defendants have followed exactly and precisely the procedures and lines as set out in Chapter 696 of the Acts of Assembly of 1952 and in no way have they denied to the plaintiffs any of their rights by violating Chapter 696 of the Acts of Assembly of 1952 or any part or section thereof. Each of these grounds was found by the Court to be separately sufficient and wherefore the Court dimissed the petitioner's motion for judgment.

On June 12, 1953, the Circuit Court of the City of Richmond had entered its decree denying permanent injunction and declaring Chapter 696 of the Acts of Assembly of 1952 to be valid in all respects. The Supreme Court of Appeals of Virginia denied the petition for a writ of error and refused

to grant an appeal of the injunction case on the ground that it was a moot question.

On the 16th day of June, 1954, the Supreme Court of Appeals of Virginia reviewed the petition of the petitioner in the instant case for a writ of error and affirmed the judgment of the Circuit Court of the City of Richmond as being plainly right. The Court thus upheld the Court's action sustaining the respondents' demurrer that this is essentially a suit against the State and that the respondents had not acted outside of the scope of authority given them by Chapter 696 of the Acts of Assembly of 1952. Neither the Circuit Court of the City of Richmond nor the Supreme Court of Appeals of Virginia considered the instant case on its merits as to whether Chapter 696 of the Acts of Assembly of 1952 is unconstitutional. The two State courts below based their decision on the theory that this is a suit against the State and is not maintainable regardless of whether Chapter 696 of the Acts of Assembly of 1952 is at some time subsequent to the acts of respondents declared to be unconstitutional.

B.

The Question Presented

The sole question before this Honorable Court at the present time is: Does the Supreme Court of the United States have jurisdiction to review the decisions of the Circuit Court of the City of Richmond and the Supreme Court of Appeals of Virginia since such decisions rested on a non-Federal ground?

II.

ARGUMENT

The Decision of the Circuit Court of the City of Richmond Rested on a Non-Federal Ground, Therefore This Honorable Court Does Not Have Jurisdiction to Hear This Case.

This Court will not review decisions of State courts when their decisions rest on non-Federal grounds. *Hedgebeth* v. *North Carolina,* 334 U. S. 806; *McCoy* v. *Shaw,* 277 U. S. 302; and *Howat* v. *Kansas,* 258 U. S. 181. Furthermore, this Court has repeatedly held that it is without jurisdiction to review a judgment of a State court unless it clearly appears that the decision turned on a Federal question. *Stembridge* v. *Georgia,* 343 U. S. 541, and *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780.

The order of the Court below does not clearly indicate that the decision rested on a Federal ground. To the contrary, the order below clearly indicates on its face that the decision rested on a non-Federal ground. It recites that petitioner's motion for judgment was dismissed because it was not sufficient in law and that the respondents' demurrer was sustained on the grounds that this was, in reality, a suit against the State, and the State had not given its consent to be sued. (The other ground, that the respondents had not acted outside the scope of their authority is conceded by the petitioner to be a non-Federal decision and is not in question here.)

However, the appellants allege that the order of the Court below disposing of the case on the non-Federal ground of being a suit against the State is so untenable and unfounded that it is arbitrary and a mere devise to prevent a review by this Court. They thus urge that this Court has jurisdiction and should review the decision of the Court below. It is true that if a State court decision on a non-Federal ground is plainly unfounded this Court may review such a decision.

Likewise, it is true that if the non-Federal ground of decision has fair support, this Court will not inquire whether the rule applied by the State court is right or wrong, or substitute its own views of what is the better rule. *Broad R. P. Co.* v. *South Carolina,* 281 U. S. 537; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651; and *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.,* 243 U. S. 157.

The Supreme Court of Appeals of Virginia has previously held suits of this nature to be a suit against the State and dismissed the same. *Sayers* v. *Bullar,* 180 Va. 222, 22 S. E. 2d 9. See also, *Wilson* v. *State Highway Commissioner,* 174 Va. 82, 4 S. E. 2d 746; *Commonwealth* v. *Chilton Malting Company,* 154 Va. 28, 152 S. E. 373; *Board of Public Works* v. *Gannt,* 76 Va. 455.

In *Sayers* v. *Bullar, supra,* the Court said:

> "There is no statute which gives a right to anyone to sue the State for tort. * * *
>
> "This Court has never been called upon before to pass judgment upon a case where employees of the State are sued for tort arising from work being done by them for the State. Such is the case at bar.
>
> "It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity, for acts done by them at the express direction of the State, unless they depart from that direction.
>
> * * *
>
> "Our conclusion is that immunity of the State from actions for torts extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by a party who has suf-

fered injury by their negligence." (180 Va. 225, 229, 230.)

It is unquestionable that the Governor and the other respondents in this suit were acting by and for the Commonwealth of Virginia persuant to the Public Utilities Act, Chapter 696 of the Acts of Assembly of 1952 (§§56-509—56-527 of the Code of Virginia), and that the respondents in no way stood to derive any personal benefits from their actions. The Circuit Court of the City of Richmond and the Supreme Court of Appeals of Virginia in upholding Ground No. 3 of the respondents' demurrer have expressly held that the respondents at no time exceeded the authority granted them by Chapter 696 of the Acts of Assembly of 1952.

There are several decisions of Federal and State courts which have held suits of this nature to be a suit against the State or Federal Government. *In Re Ayers,* 123 U. S., 443; *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459; *Lowenstein* v. *Evans,* 69 Fed. 908 (C. C. 1895); *Union Trust Co.* v. *Stearns,* 119 Fed. 790 (C. C. 1903); *Sperry-Hutchinson Co.* v. *Kuhn,* 212 Fed. 555 (D. C. 1912); *Tyler* v. *Dane County,* 289 Fed. 843 (D. C. 1923); *Parsons* v. *Slaughter,* 63 Fed. 876 (C. C. 1894); *Hampton* v. *State Board of Education,* 90 Fla. 88, 105 So. 323; *Heiser* v. *Severy,* 117 Mont. 105, 158 P. 501; *Looney* v. *Stryker,* 31 N. M. 557, 249 P. 112; *Allen Engineering Co.* v. *Kays,* 106 Ark. 174, 152 S. W. 992; *Cannon* v. *Montgomery,* 184 Ga. 588, 192 S. E. 206.

There are decisions from the courts of other States which clearly support the doctrine that so long as the Governor acts in good faith, believing the act of which complaint is made to be necessary to the enforcement of the law, he is not personally liable to one injured by such act, although

sufficient reason for his act did not exist. This doctrine is based upon the familiar doctrine of non-liability of a judicial officer, the office of Governor in fact requiring the exercise of discretion being considered analogous to that of a judge. *Moyer* v. *Peabody,* 212 U. S. 78; *Drucker* v. *Salomon,* 21 Wis. 628, 94 A. M. Dec. 571; *Hatfield* v. *Graham,* 73 W. Va. 759, 81 S. E. 533.

The petitioner lists several authorities to support his contention that a suit against an officer of a State for enforcing an alleged unconstitutional statute is not a suit against the State. None of the authorities cited by the petitioner appear to involve facts similar to this case. The great majority of the authorities supporting the petitioner's position involve injunction suits directed against an officer of a State seeking to enjoin him from enforcing or acting under an alleged unconstitutional statute. Such is the companion case to the instant one. In the case of H. J. Harris, et als v. John S. Battle, Governor of Virginia, et als, No. 111, October Term, 1954, which is pending in this Honorable Court, the petitioner in the instant suit and others, are seeking to enjoin the respondents in the instant suit from enforcing Chapter 696 of the Acts of Assembly of 1952 on the ground that the Act is unconstitutional. The respondents did not, in that matter, ever take the position that the suit was one against the State and therefore should be dismissed. The other type of cases supporting the petitioner's position are actions in replevin to recover specific property taken by a State officer under an alleged unconstitutional statute. The authorities on this point are divided, some holding this to be suit against the State and others holding this not to be a suit against the State. The instant case is solely for pecuniary damages in tort for enforcing an allegedly unconstitutional State statute. It differs in this respect with the authorities cited by the petitioner.

If the contentions of the petitioner in the instant case were sustained, then before the Governor or any other officer of the State of Virginia or any other State, or even the President of the United States, could enforce a law which had been duly enacted by the State Legislature, or Congress, without fear of personally being held liable for civil damages, he would have to have the constitutionality of every act of the Legislature ruled on by the Courts. It can readily be seen that this would place an impossible burden on both the executive and judicial branches of our government.

The Governor of Virginia is placed under a mandatory duty by the Public Utilities Act to take immediate possession of the utility for operation by the Commonwealth if there is a suspension or curtailment of operation of the utility to such an extent that it will, in his judgment, constitute a serious menace or threat to the public health, safety or welfare. (§2 of Chapter 696; §56-510 of the Code of Virginia) If such a suspension in the operation of a utility occurred and the Governor did not perform his mandatory duties, not only would he be guilty of a breach of the public trust but he would also be subject to impeachment proceedings. The other respondents were State officers under the authority of the Governor and they were acting solely under the direction of the Governor.

In *Moyer* v. *Peabody, supra,* this Honorable Court dismissed a suit against the Governor and certain officers of the National Guard of the State of Colorado. This Court held:

> "So long as such arrests are made in good faith and in the honest belief that they are needed in order to heed the insurrections, the Governor is the final judge and cannot be subjected to an action after he is out of office, on the grounds that he had not reasonable grounds for his beliefs." (212 U. S. 84)

This holding by the Supreme Court of the United States in sustaining a demurer states the respondents' position in the instant case. They seized and operated the public utility in good faith under the Public Utilities Act. They denied the petitioner employment on January 19, 1954, in good faith under the Public Utilities Act. Therefore, they take the position that this action for damages for their performing their mandatory duties in good faith should be dismissed. The respondents respectfully submit that an action in tort, or an action for pecuniary damages against State officers who are performing their mandatory duties, and where they are not acting outside of the scope of the authority and duty imposed upon them by the State Legislature, is a suit against the State. Therefore, the respondents pray that this Honorable Court will dismiss the petition of the petitioner on the ground that the decision of the State Court below was on a non-Federal ground.

III.

CONCLUSION

Wherefore, the respondents respectfully submit that for the reasons stated, this Court does not have jurisdiction to review the decisions of the State Courts below since their decisions rest solely upon a non-Federal ground, and the respondents respectfully move the Court to dismiss the petitioner's petition for writ of certiorari.

Respectfully submitted,

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Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

October 11, 1954

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DEC 2 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 341

WALTER LEE HALL,

Petitioner,

vs.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, ET AL.,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

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IN THE

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WALTER LEE HALL, *Petitioner,*

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JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA; H. LESTER HOOKER, CHAIRMAN AND W. MARSHALL KING AND RALPH T. CATTERALL, MEMBERS, STATE CORPORATION COMMISSION; WILLIAM C. SEIBERT, CHARLES H. RYBURN, JR., AND T. H. FLETCHER, JR., *Respondents.*

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Walter Lee Hall prays that this Court grant rehearing of its order of November 8, 1954, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia in the above-entitled case as prayed for in the petition filed September 13, 1954.

Reasons for Granting Rehearing and Issuing the Writ

IN VIEW OF WHAT HAS OCCURRED SINCE THIS PETITION FOR A WRIT OF CERTIORARI WAS FILED IT IS NOW CLEAR THAT IF SAID PETITION IS DENIED THERE IS NO WAY IN WHICH THE CONSTITUTIONALITY OF THE VIRGINIA PUBLIC UTILITIES SEIZURE LAW CAN EVER BE REVIEWED.

This suit was filed by petitioner to recover damages suffered as a result of the enforcement by respondents of the Virginia public utilities seizure law (Code of Virginia, Title 56, Ch. 17, Sec. 56-509 to 56-527). The principal ground relied upon was that the statute in question is unconstitutional in that it is in conflict with the Labor Management Relations Act, 1947.

The courts below dismissed the action on the ground that it constituted a suit against the state, a ground which petitioner has argued in its petition for a writ of certiorari filed with this Court is without fair support and raised solely as a device to prevent consideration of the important federal question involved.

When the petition for a writ of certiorari was filed in this Court on September 13, 1954, there was still pending in this Court an appeal in *Harris et al vs. Stanley, et al.*, Case No. 111. That case involved a suit, instituted by the officers of the labor organization of which petitioner herein is a member, likewise alleging that the Virginia public utilities seizure law is unconstitutional, and, on the basis thereof, seeking a declaratory judgment to that effect and an injunction against any future application of said law. The Circuit Court of the City of Richmond held that the statute in question is valid and constitutional; the Supreme Court of Appeals of Virginia refused an appeal on the ground that the cause had become moot; and an appeal was taken to this Court.

Petitioner had expected that this Court would regard the mootness contention in the appeal in Case No. 111, like the "suit against the state" contention in the instant case, as untenable, and would refuse to allow that contention to stand as a barrier to review of the important federal questions involved. However, on October 14, 1954, prior to the denial of the petition for certiorari in the instant case, this Court denied the appeal in Case No. 111, and on November 22, 1954, denied a Petition for Rehearing in that case.

As a result of the denial of the appeal in Case No. 111 and the denial of the petition for a writ of certiorari in the present case, petitioner now finds that **the only two avenues by which the constitutionality of the Virginia public utilities seizure law could practicably be tested have been closed by procedural devices which have no support in law or reason.** The Commonwealth of Virginia is now free in any future labor dispute to enforce against petitioner and the thousands of other public utility employees of that state a law, **the constitutionality of which has never been passed upon by any appellate court.** And, though that law is invalid on its face, Virginia may properly infer from what has happened in this case and in Case No. 111 that, short of a criminal proceeding under those sections of the law which impose criminal sanctions, there is no way in which the constitutionality of that law can be attacked. The following, in brief, are the lessons that must be drawn from these two cases, if the denial of certiorari here sought to be reheard is allowed to stand:

1. If a suit is brought to obtain a declaratory judgment that the Virginia seizure law is unconstitutional and to enjoin its enforcement such suit will be declared moot at any time that a particular seizure that has been instituted is lifted, even though (as was done in Case No. 111) the pleadings allege that the statute constitutes a continuous interference with the right to strike and to bargain collectively guaranteed by federal law, and the plaintiff prays for permanent future relief. That means that this technique of raising the federal questions and obtaining a decision by this Court upon the constitutionality of the seizure law must be ruled out, for it is available only if the labor dispute between the employer and labor union which gives rise to the seizure and requires continuation of the seizure is kept alive, current and unsettled for the more than two years it takes to reach this Court in an injunction action.

2. If suit is brought to recover damages resulting from the enforcement of the seizure law the cause will be dismissed as a suit against the state instituted without the state's consent, even though (as was true in the instant case) the action is grounded on the contention that the law under which the defendant state officials acted is unconstitutional. Petitioner recognizes, of course, that the denial of the petition for a writ of certiorari in the instant case should not be construed as an affirmance by this Court of the lower court's holding—in contravention of all existing precedent—that the suit involved herein is a suit against the state. But it must reasonably be assumed that the courts of Virginia will now follow the precedent they have established in this case and will dismiss, on the grounds which this Court has now refused to review, any suit for damages, even though it brings into issue the constitutionality of the seizure law.

3. Nor is there any possibility of avoiding the principle which now bars a damage suit to test the validity of the Virginia seizure law in the Virginia courts by bringing suit in a federal court. In *International Longshoremen's Association* v. *Battle*, 101 F. Supp. 651, the United States District Court for the Eastern District of Virginia dismissed a suit brought in that court to test the validity of an earlier version of the Virginia public utilities seizure law, on the ground that the suit should have been brought in the Virginia state courts. That court said—in words that surely warrant reexamination now—"Plaintiffs have an altogether adequate remedy in the State courts." This Court affirmed that decision in 342 U. S. 880.

4. What would remain as the only means of obtaining review of the constitutionality of the Virginia seizure law if the denial of the petition for a writ of certiorari in the instant case is permitted to stand is to subject some employee of a public utility or officer of a labor organization

covered by the law to the sanctions imposed for a violation of the criminal provisions of the seizure statute and to raise the constitutionality of the law in an action attacking his arrest and punishment. But it need hardly be said that to require that men subject themselves to criminal prosecution and punishment in order to obtain a determination by this Court of the constitutionality of a state law which jeopardizes their employment is too unjust and too much against public policy to contemplate.

It is altogether possible and understandable that with its crowded docket this Court did not perceive the relationship between the instant petition for certiorari and the appeal in Case No. 111, and that this Court did not perceive that having denied the appeal in that case subsequent to the filing of the petition in this one it was, by denying the petition in this case, foreclosing any reasonable way in which the validity of the Virginia public utility seizure law could ever be brought to this Court for review. The effect of that law is felt every time any of the collective bargaining representatives of the public utility employees in Virginia engage in collective bargaining, whether it be in the negotiation of a new agreement or the day-to-day administration of an existing contract. The validity of that law has never been passed upon by any appellate court. To deny the employees involved every reasonable means of obtaining review of the constitutionality of that law is an injustice that this Court should not countenance.

Conclusion

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Appeals of Virginia and/or to the Circuit Court of the City of Richmond.

Respectfully submitted,

BERNARD CUSHMAN,
Counsel for Petitioner.

O. DAVID ZIMRING,
I. J. GROMFINE,
JUSTUS R. MOLL,
SEYMOUR J. SPELMAN,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 58 of the rules of this Court.

BERNARD CUSHMAN,
Counsel for Petitioner.